IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27-7-2007

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

C.M.A.No.1224 of 2000

The Regional Director,
E.S.I. Corporation,
143, Sterling Road,
Madras - 34. ... Appellant(Respondent)

Vs.

M/s.Skiltek Engineers,
rep.by its Managing Partner,
V.Lakshmanan,
120, Angappa Naicken Street,
Madras - 600 001. ... Respondent/(Petition)

This Civil Miscellaneous Appeal is preferred against the order dated 12.11.1999 made in ESIOP No.71 of 1990 on the file of I Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.G.Desappan

For Respondent : Mr.Pauldas
for M/s.Sampathkumar Associates

J U D G M E N T

This Civil Miscellaneous Appeal is filed by the Regional Director, Employees State Insurance Corporation, Madras, challenging the order dated 12.11.1999 made in ESI.O.P.No.71 of 1990.

2. The respondent herein filed ESI.O.P.No.71 of 1990 under section 75 of the Employees State Insurance Act, 1948, to set aside the order dated 30.5.1990 declaring that the respondent establishment is not covered under Employees State Insurance Act, 1948, for the period from 9.3.1989 to 8.3.1990 on the ground that the respondent establishment is engaged in the business of manufacturing certain industrial products, having a small unit with seven employees to work regularly and at times one or two casual employees be engaged and at no point of time ten or more persons were engaged.

3. On 9.3.1989, the Inspector of ESI Corporation visited the

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respondent establishment and verified the records, pursuant to which a communication was issued on 3.4.1989 stating that the respondent establishment is covered under the Employees State Insurance Act, 1948, from 9.3.1989 and on the basis of the said inspection report C-18 notice dated 21.3.1990 was issued to the respondent establishment to show cause as to why contribution should not be determined at Rs.8,421.60 from March, 1989 to February, 1990 and orders under section 45A should not be passed calculating at 7.25% and the assumed wages of Rs.880/- per month per employee. The respondent establishment sent a reply on 7.5.1990 disputing the coverage. Respondent's representative appeared before the appellant on 11.5.1990 and explained in person that the respondent establishment is not covered under the Employees State Insurance Act, 1948. In spite of the same, on 30.5.1990, an order was passed under section 45A for Rs.8,204/- towards contribution from 9.3.1989 to 8.3.1990 with 12% interest and the same was directed to be paid within 15 days. The grievance of the respondent establishment was that without serving the inspection report, which is the basis for issuing the show cause notice, the coverage of the respondent establishment under the Employees State Insurance Act, 1948, was passed.

4. The E.S.I. Court framed the following issues:

(a) Whether the respondent establishment is not covered under the ESI Act for the period from 9.3.1989 to 8.3.1990 ?

(b) Whether the order passed under section 45A on 30.5.1990 directing the respondents to contribute Rs.8,294/- is illegal or not ?

5. The E.S.I. Court considered the defence of the respondent establishment that at any point of time more than seven persons were not employed in the respondent establishment. One Murali was examined as PW-1 and one Tamilmani was examined as PW-2. Their evidence was that after the inspection of the establishment, copy of the inspection report was not sent to the establishment. The said Murali also submitted that two persons viz., Veeraraghavan and Purushothaman, who were found at the time of inspection, were not engaged by the respondent establishment and the said Veeraraghavan was working in some other company. One Dayalan and Murali were engaged casually on that particular day and the attendance register which was marked as Ex.A-7 contained only seven persons' name who were employed in the company. RW-1 who was the Assistant Director of the ESI Corporation deposed that on 9.3.1989 he inspected the premises and found that the establishment was manufacturing automobile componnts and he found 11 persons were working and he submitted a report Ex.R-1.

6. The E.S.I. Court found that the said Veeraraghavan and Purushothaman were employees of Insap Flexibles and Engineers Private Limited and Murugan Industries and they are not employees of the respondent establishment. The ESI Court also found that during the inspection, attendance register and wage register were verified, but still the Inspector who was examined as RW-1 submitted Ex.R-1 report on presumption without proper enquiry. The Inspector also failed to note the salary paid to other persons beyond seven in his inspection report and

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therefore allowed the appeal filed by the respondent herein.

7. In this appeal even though the following three questions of law were raised,

(1) Whether the finding of the Lower Court that the respondent establishment was not coverable, can be sustained in law ?

(2) Whether the determination of contribution on notional wages is wrong when the respondent did not produce the necessary records ?

(3) Whether the order of the Lower Court is not liable to be set aside on anyone or more of the grounds thereof ?

I am of the view that the same are only questions of fact which are already answered by the E.S.I.Court and there is no clinching evidence to show that more than seven persons were employed in the respondent establishment on the date of inspection.

8. Section 45A of the ESI Act clearly states that no order shall be passed by the Corporation unless the principal or immediate employer or the person in charge of the factory or establishment has been given a reasonable opportunity of being heard.

9. Admittedly the inspection report which was used as basis for issue of show cause notice was not served by the E.S.I. Corporation. In the decision reported in 1982 Lab.I.C. 1787 (Regional Provident Fund Commissioner, Employees' Provident Fund, New Delhi and another v. Glamour-Proprietor Seth Hassaram and Sons (India) Pvt. Ltd., New Delhi and others) a Division Bench of the Delhi High Court held that the inspection report is bound to be given to comply with the principles of natural justice. In the decision reported in AIR 1970 SC 2042 (Chandra Bhawan Boarding and Lodging, Bangalore v. State of Mysore) it is held that dividing line between the administrative power and quasi-judicial power is quite thin and the principles of natural justice apply to the exercise of the administrative power as well. Even though the order passed under section 45A of the Employees State Insurance Act, 1948, is on the basis of best assessment, in view of the provisions contained in Section 45A(1), the report copy shall be furnished.

10. It is not the case of the appellant that the respondent establishment has not co-operated. In the absence of co-operation from the establishment only best assessment order under section 45A can be passed unilaterally. The respondent establishment cannot be treated as non-cooperative since they have produced attendance register and wage register. Still the Inspector presumed the payment of wages to persons other than seven employees and taking note of the said facts also ESI Court set aside the same. In the decision reported in (2007) 1 SCC 584 (ESI Corporation v. C.C.Santhakumar), in paragraph 15, the Honourable Supreme Court explained the position by stating that unilateral order of best assessment can be passed under section 45A, only if there is no co-

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operation from the establishment and the said amount determined can be recovered as arrears of land revenue under section 45B of the Act.

11. Hence I am of the view that the mandatory requirement under proviso to section 45A(1) was not followed and the respondent establishment was denied of reasonable opportunity of being heard before covering the respondent establishment under the Employees State Insurance Act, 1948.

There is no merit in the Civil Miscellaneous Appeal and the same is dismissed. No costs.

sd/-
Asst.Registrar

/true copy/

Sub Asst.Registrar

vr

To
1. The Registrar,City Civil Court, Chennai.

2. The I Additional Judge,
City Civil Court, Chennai.

3. The Record Keeper,
V.R.Section, High court Madras.

+ 1 cc to Mr.Sampath kumar Associates Advocate SR No.47076

JRG(CO)
RD 20.8.07

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